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E.O. 12958: N/A

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SUBJECT: LEGAL EXPERTS AGREE ZUMA CASE UNLIKELY TO BE
RESOLVED SOON

¶1. (SBU) Summary: Two prominent legal experts -- one a harsh critic of Jacob Zuma and one a strident defender -- agree that Zuma's legal travails are unlikely to be resolved in the next year, and National Prosecuting Authority (NPA) mishandling of the case is to blame for the government's inability to go forward with a case against Zuma. While they further agree that the government's appointment of a compliant NPA head would be the easiest way to see charges against Zuma dropped, they differ over the ease at which either President Motlanthe -- or Zuma after elections this year -- could make such a move. The two also differ over the merits of Zuma's application for a permanent stay of prosecution, which will be filed in the Pietermaritzburg High Court in June. Ultimately, comments by both suggest that the cloud hanging over Zuma's head is highly unlikely to disappear for quite some time after he probably assumes the national Presidency after the election in April. End summary.

CONSTITUTIONAL SCHOLAR PESSIMISTIC ON QUICK RESOLUTION

¶2. (SBU) Pierre de Vos, a professor of constitutional law at the University of Western Cape and prominent commentator on legal issues, told Pol/Econoff and visiting Pretoria Poloff on February 9 that Jacob Zuma's case has little chance of resolution in the next 18 months. De Vos noted that the August 25 date on which his trial is supposed to start is irrelevant; the date that matters is June 24, when Zuma and the French armaments firm Thint will make a joint application for a permanent stay of prosecution in the Pietermaritzburg High Court. De Vos said Zuma's lawyers appear likely to seek this stay on the grounds that the long period of time it has taken the NPA to bring charges against him -- starting with former NPA head Bulelani Ngcuka's 2003 declaration that a prima facie case existed against Zuma -- has unfairly prejudiced the courts against Zuma and prevents him from getting a fair trial. De Vos notes that Ngcuka, probably at the behest of former President Thabo Mbeki, probably made that statement in an effort to scare Zuma into backing down from his presidential aspirations. Rather, the statement backfired spectacularly, leading many disaffected ANC cadres to support Zuma on the grounds that he was being unfairly persecuted by Mbeki.

¶3. (SBU) De Vos said he was not sure whether such an approach would work, though legal statutes suggest such an approach has some merit. However, he notes that Judge Leona Theron will have to weigh such claims against equally compelling arguments that it is in the public interest for Zuma to answer the charges against him. (Note: Although de Vos spoke highly of Theron and respects her integrity, he also noted that she is considered a front runner for a seat on the Constitutional Court, which has four vacancies this year. As these positions are appointed by the President, he said that her judging this case creates a potential conflict of interest. End note.) Ultimately, de Vos said that no matter how Theron rules, the losing side will likely appeal the verdict, and de Vos said he saw little likelihood of the case being resolved in legal channels in the next 18 months. He doubts the August 25 trial date will actually occur.

¶4. (SBU) A political resolution to Zuma's troubles looks to be the easiest way out for Zuma, but de Vos notes that such moves carry risks as well. De Vos doubts that the ANC has

the gumption to go as far as to change the Constitution to protect Zuma, such as inserting a clause that would prevent the prosecution of a sitting President. It would cause too much of a public outcry, damage South Africa's international reputation, and may not even be possible if the ANC does not get two-thirds of the vote in this year's election. The National Assembly could pass a piece of legislation to protect Zuma, but de Vos doubts the Constitutional Court -- which has been clear in supporting the principle that all are equal under the law -- would uphold such legislation.

15. (SBU) The simplest, and most likely, attempt at a political resolution is likely to be the appointment by President Motlanthe -- or President Zuma assuming he is elected after this year's election -- of a new, compliant head of the NPA who would simply dismiss charges against Zuma. Many ANC loyalists -- like former Limpopo Premier Ngoako Ramatlhodi -- are rumored to be considered for such a position. De Vos noted such a move also would cause widespread outrage, and he also commented that it might not be legally possible at the moment since dismissed NPA head Vusi Pikoli plans to appeal his dismissal to the Johannesburg High Court and, if need be, ultimately to the Constitutional Court. The results of these appeals probably will not be known for four or five months, and it is legally unclear whether a President can appoint a permanent head in the meantime.

ZUMA LEGAL ADVISER CONFIDENT OF SUCCESS

16. (SBU) Paul Ngobeni, the deputy legal registrar at the University of Cape Town and a prominent public defender of Zuma, echoed similar points to Polloff and Pol/Econoff later that same afternoon. (Note: Ngobeni, who practiced law in Connecticut until mid-2007, as of mid-2008 was facing five counts of larceny, fraud, and illegal practice by that state's authorities in connection to non-delivery of services and practicing under suspension. He has publicly proclaimed his innocence and has said that the charges were likely to be dismissed. He made no mention of these legal troubles in the meeting. End note.)

17. (SBU) Ngobeni hit strongly on the point that the time it has taken to bring Zuma to trial has unfairly prejudiced potential judges against him, a point he emphasized in a lengthy tour d'horizon of the case. Like de Vos, he noted that Ngcuka's declaration of a prima facie case against Zuma was a tremendous mistake by the NPA. If they thought they had a case then, they should have prosecuted. If they had such a case then, Ngobeni asked, why did they wait until after the 2005 conviction of Zuma financial adviser Schabir Shaik to file charges against Zuma? All of it, Ngobeni said, reeks of political conspiracy against Zuma.

18. (SBU) As for the way forward for Zuma, Ngobeni said that Zuma and the ANC are taking a two track approach by appealing the Supreme Court of Appeals January verdict that charges against Zuma can proceed as well as seeking the permanent stay of prosecution. (Note: Ngobeni admitted that the ANC's decision to join the Zuma case as "a friend of the accused" was unlikely to either help or hinder Zuma's legal standing. He said the move was smart politically, but has no fundamental basis for the case. End Note.) Key to both of these cases are going to be appeals based on sections 34 and 38 of the Constitution, which guarantee, respectively, the right to a fair trial and the right of relief from prosecution should an individual's civil rights be violated before he or she can be brought to trial. Ngobeni thinks such arguments are strong ones, though he noted that he advised the ANC that they should have taken such an approach more than a year ago. However, he said political considerations kept the party from doing so at the time.

19. (SBU) Ngobeni said he was not sure about chances of success in the Constitutional Court, but he claimed that

there was a "90 percent" chance of success in getting a permanent stay of prosecution, as he thinks arguments that Zuma cannot get a fair trial are too strong to ignore. Ngobeni said that if neither of these appeals are successful, the ANC will consider solving the matter through political means by appointing an NPA head who will dismiss the case. While the ANC wants to resolve Zuma's problems through "legal" means, Ngobeni thinks such a solution might be the ultimate resolution of the case. Asked whether Pikoli's appeal could complicate this, Ngobeni responded in the negative, noting that even if the Constitutional Court finds Pikoli was wrongly dismissed, it could not reappoint him since the NPA head is a political appointment named by the President.

COMMENT

¶10. (SBU) Both de Vos and Ngobeni made it clear that the legal arguments likely to be made around whether Zuma's trial goes forward have nothing to do with Zuma's guilt or innocence. De Vos said that Zuma would be in "deep trouble" if his case ever went to court, while even Zuma-backer Ngobeni said that does not know if Zuma is guilty or not. QNgobeni said that does not know if Zuma is guilty or not. Rather, arguments in the coming months will focus more on whether Zuma's civil rights were violated, and if they were, whether a dismissal of the case would be in the public good. It is difficult to say how the courts will rule, but it does appear likely that the appeals process will go on long after Zuma likely becomes President of South Africa. That is, of course, if the ANC government continues to let the courts take on the case -- the dropping of charges by a compliant new head of the NPA is a very real possibility, and one that has worrying implications for South Africa's commitment to upholding the rule of law.

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